No. 1455

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IN THE

United States Circuit Court of Appeals

IN AND

FOR THE NINTH CIRCUIT.

A. ZIMMERMAN, ED. WURZBACHER, ROY FAIRBANKS and ANDREW JACK,

Plaintiffs in Error,

vs.

JAMES FUNCHION and AMY SALE,

Defendants In Error.

BRIEF FOR APPELLANTS IN ERROR.

JOHN L. McGINN,
M. L. SULLIVAN,
Attorneys for Plaintiffs in Error.

CAMPBELL, METSON, DREW,
OATMAN & MACKENZIE, and
E. H. RYAN,
Of Counsel.

PRESS OF
THE JAMES H. BARRY CO.
SAN FRANCISCO, CAL.

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BRIEF FOR APPELLANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action in ejectment brought by the defendants in error to determine their right of possession to a certain placer mining claim situated on Dome Creek in the Fairbanks Recording District, Territory of Alaska, known as Creek Claim No. 6 Above Discovery. The real dispute was as to a strip of ground lying just below the alleged north boundary line of said Creek Claim No. 6, and which may be denominated an overlap.

The defendants in error claimed this strip of ground under a location made on the 17th day of September, 1902, and the plaintiffs in error claimed it as part of their location of Bench Claim No. 6, First Tier right limit of Dome Creek, which location was made on the 12th day of May, 1904.

The testimony in the case shows that Zimmerman, one of the plaintiffs in error, went out on the ground in controversy on May 12, 1904, and no one was in the actual possession thereof. He found the lower center stake of the defendants in error, "E" (plaintiffs' Exhibit B), on which was written that the locator claimed 1320 feet up stream by three hundred and thirty feet on each side of the stake, with no reference to or call for any other monument. Zimmerman then followed a slightly blazed trail to its termination at a distance of about 345 feet, which he stepped off, and where he found another stake, mildewed, and on which there had been some writing, which was almost entirely obliterated, all but the words "Dome Creek." He naturally assumed that to be the northwest corner stake of the creek claim No. 6, it being more than three hundred and thirty feet from the said lower center stake "E," which he had first discovered at the end of the blazed trail. He therefore established his location post a few feet therefrom, designated as point "C" on defendants' Exhibit B, claiming 1320 feet up stream and 660 feet up hill (Tr., 148-9-152).

From that point he went up stream 1320 feet and established his southeast corner and from each of these stakes at points about 660 feet northerly thereof, he established his other corner stakes and partly blazed his lines (Tr., 154-5). In April, 1905, Funchion, who had originally located Creek Claim No. 6 Above Discovery, came out on the claim and blazed the alleged lines of said Creek Claim No. 6, and it was not until then that Zimmerman first became aware of the fact that Funchion claimed his northwest corner to be not at the point which Zimmerman believed it to be, but at some distance to the north and west thereof, namely, at the point "A" designated on defendants' Exhibit B, and which is admitted to be some four hundred and seventy-seven feet from the lower center stake (Tr., 52). This condition naturally caused an overlapping of the boundaries of the two claims.

In June, 1906, Zimmerman in sinking upon the ground in dispute discovered pay dirt, being the first pay streak to be uncovered on the creek (Tr., 164). And thereafter the defendants in error instituted this action.

There is no question raised as to the proper marking, discovery or the completion of the location of the claim of Zimmerman by the recordation of a proper location certificate.

It is admitted that when the defendants in error located their claim, it included an area in excess of twenty acres, and when the plaintiffs in error made

their location it covered a portion of the excessive area of Creek Claim No. 6. Up to that time, defendants in error had made no attempt to draw in their lines, nor did they do so until long after the plaintiffs in error had struck pay on the disputed ground in June, 1906, when they threw off a portion of the ground on the southern end of the location so as to make their claim conformable to the statute; but retained the disputed piece upon which the plaintiffs in error had been working steadily, sinking numerous holes to bedrock and had discovered the pay streak. The drawing in of the lines of the defendants in error took place after the institution of the suit on November 2, 1906 (Tr., p. 341), and after the ground had been surveyed by surveyors employed by both parties in September and October, 1906, respectively, the surveys returned showing conclusively that the location of the defendants in error exceeded twenty acres (Tr., p. 338, 340, defendants' Exhibit B and plaintiffs' Exhibit A). Prior to this time and after the discovery of the pay streak by Zimmerman, defendants in error had the ground surveyed by a man by the name of Jackson, who reported that it was under twenty acres in extent, but it is admitted that his survey was erroneous (Tr., 339), the other two surveys, being admitted to be, with the exception of trifling differences, substantially correct.

The contention made upon the part of the plaintiffs in error is twofold. First, that the defendants in error are bound by the marking on their lower center stake,

and secondly, having located a claim in excess of the statutory area of twenty acres, the claim was void as to such excess; and as plaintiffs in error claimed the excess in May, 1904, by a valid location, they had the better right thereto. That the defendants in error could not appropriate more than twenty acres of the public domain and exercise their discretion as to the time of throwing off the excess to the exclusion of subsequent valid locators.

The case was tried before the Hon James Wickersham, sitting without a jury, and thereafter he made his findings of fact and conclusions of law in favor of the defendants in error (Tr., 18, 25) and from the judgment entered on said findings of fact and conclusions of law, this writ of error is prosecuted by plaintiffs in error, who herewith assign the following errors upon which they rely in support of their application to this court for a reversal of the judgment herein:

SPECIFICATIONS OF ERROR.

I.

The Court erred in refusing to make the findings of fact as set forth in paragraph 1 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

> "1. That the defendant, A. Zimmerman, is now, and for a long time hitherto has been, the owner in fee as to all persons save and except the United

States in possession and entitled to the possession of that certain placer mining claim described in the answer in this case, as bench claim No. 6 above Discovery on the right limit, first tier of benches on Dome Creek, in the Fairbanks Recording District, Territory of Alaska, which said claim is marked upon the ground as follows: Commencing at a point designated upon Defendants' Exhibit 'B' introduced upon the trial of said cause (reference to which is hereby made and leave asked that the same be incorporated in and made a part of the findings of fact in this case) by the letter 'C' from said point in a northerly direction uphill about 600 feet to the northwest corner stake of said claim; thence from said point 'C' north 85 degrees and 44 minutes east 1367.4 feet to a point indicated upon said defendants' Exhibit 'B' by the letter 'B.' Thence from said point 'B' uphill and in a northerly direction 600 feet to a stake which marks the northeast corner stake of said bench claim No. 6 right limit; thence west about 1320 feet to the northwest corner of said claim."

II.

The said Court erred in refusing to make the finding of fact set forth in paragraph 2 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

"2. That the defendant, A. Zimmerman, on the 12th day of May, 1904, and when the above-described property was open, unappropriated, va-

cant mineral land of the United States and subject to entry for placer mining purposes, did enter upon, locate and segregate said land from the public domain by marking the boundaries of said location on the ground in such a manner that the same could be readily traced, to wit: By blazing a tree at the point indicated upon said plat by the letter 'C,' which marked the southwest corner of said claim, and by writing upon said tree so blazed substantially that the said defendant Zimmerman claims 660 feet northerly and uphill from said tree and 1320 feet upstream, for placer mining purposes, and by further marking the said claim by establishing a substantial stake at the point indicated upon the plat marked Defendants' Exhibit 'B,' upon which he wrote that he claimed 1320 feet downstream and 660 feet uphill, and by further establishing a stake about 600 feet northerly from said point designated upon said plat marked Defendants' Exhibit 'B,' by the letter 'B,' and upon which he wrote his name and marked the same as his northeast corner stake, and by establishing a northwest corner stake at a point northerly about 600 feet from the point specified upon said plat by the letter 'C,' and by cutting out and blazing the lines thereon; and did then and there so mark the boundaries of said claim upon the ground that the same could be readily traced."

III.

That the said Court erred in refusing to make the finding of fact set forth in paragraph 3 of defendants'

proposed findings of fact and conclusions of law, which reads as follows:

> "3. That thereafter and within ninety days therefrom the said A. Zimmerman caused a notice of location of said claim to be recorded in the records of the Fairbanks Recording District, District of Alaska, in which said Recording District said claim was and is located, which location notice so recorded contained the name of A. Zimmerman as locator, the date of the location as May the 12th, 1904, and described said claim with reference to adjoining claims, so that the same could be readily identified."

IV.

That the said Court erred in refusing to make the finding of fact set forth in paragraph 4 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

> "4. That thereafter and in the month of June, 1904, the said Zimmerman made a discovery of gold within the exterior boundaries of the claim heretofore described, and ever since said time, and from the date of said location has resided upon said claim, working and developing the same, and been in the actual possession thereof."

V.

That said Court erred in refusing to make the finding of fact set forth in paragraph 5 of defendants' pro-

posed findings of fact and conclusions of law, which reads as follows:

> "5. That ever since said 12th day of May, 1904, defendant Zimmerman has been, and now is, the owner in fee of said property and every part and parcel thereof."

VI.

That said Court erred in refusing to make the finding of fact set forth in paragraph 5 of defendants' proposed findings of fact and conclusions of law, which reads as follows:

> "6. That the plaintiffs herein did not, at the time of the commencement of this action, nor since said time, or at any other time, own or have any estate, interest or claim in or to said property, or to any part or parcel thereof."

VII.

The said Court erred in refusing to find as conclusion of law paragraph 1 of defendants' proposed conclusions of law, which reads as follows:

> "1. That the defendant Zimmerman is entitled to a judgment ordering and adjudging that he is the owner in fee as to the property set forth in his answer in said cause, and heretofore set forth and known and described as No. 6 first tier, right limit, above Discovery, on Dome Creek, in the Fairbanks Recording District, District of Alaska, and that said

defendant is entitled to the sole and exclusive, peaceable and quiet possession of the same."

VIII.

The said Court erred in refusing to find as a conclusion of law as set forth in paragraph 2 of defendants' proposed conclusions of law, which reads as follows:

"2. That the plaintiffs herein have no estate, right, title or interest in and to said property or to any part or portion thereof, and that the defendant Zimmerman is entitled to a judgment that the plaintiffs recover nothing by this action, and that said plaintiffs have no right, title or interest in and to said property, and that the defendant Zimmerman is the owner and entitled to the possession of the whole of the property heretofore described and particularly to the portion of the same which the plaintiffs seek to recover in this action."

IX.

That said Court erred in refusing to find as a conclusion of law as set forth in paragraph 3 of defendants' proposed conclusions of law, which reads as follows:

"3. That a judgment be entered in accordance herewith."

X.

The said Court erred in refusing to make a finding of fact as is set forth in defendants' request for findings

of fact, or one of similar import thereto, which is contained in paragraph 1 thereof, which reads as follows:

"1. That on the 12th day of May, 1904, the defendant, A. Zimmerman, a prospector by occupation, while searching for open mineral land of the United States, for the purpose of locating the same, went upon Creek Claim No. 6 below Discovery, on Dome creek, and saw the lower center stake thereof, and saw written thereon that the locator, Ross, claimed 1320 feet upstream and 330 feet on each side. That there was nothing written upon said stake to indicate that at a point 1320 feet upstream, or at a point 330 feet on each side thereof, the said locator, Ross, had placed stakes or other monuments so as to mark the boundaries of said claim."

XI.

The said Court erred in refusing to make a finding of fact as set forth in paragraph 2 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"2. That the said defendants, Zimmerman, after examining said lower center stake of said claim No. 6 below Discovery on Dome Creek, went to a point north one degree and two minutes east of said lower center stake 345.8 feet, and made an examination of said place, and did not see, nor was he able to find, any stake, or other monument which marked the northwest corner of said claim No. 6; but at said point he saw a small stake which he believed to be

the northwest corner stake of said No. 6 below Discovery on Dome Creek, and so believing and at said point there being nothing to indicate where plaintiffs' claimed their northwest corner stake of said No. 6 was, established a stake being the southwest corner stake of bench claim No. 6 above Discovery on Dome Creek, right limit, and then proceeded and did mark the boundaries of his said claim as is set forth in the defendants' proposed findings of fact. That the country in and about said claim and in the vicinity thereof is covered with brush and timber, and the view from one corner of said claim to another so obstructed by intervening brush and timber, and at said time, to wit, on the 12th day of May, 1904, it was impossible to determine the boundaries of the claim upon said Dome Creek unless the stakes or posted notices indicated the extent the locator claimed, or unless the lines of said claim were blazed and cut so that they could be readily traced."

XII.

That said Court erred in refusing to make a finding of fact as is set forth in paragraph 3 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"3. That the location as made by the said Ross in September of 1902 contained within its limits 21.641 acres as will more fully appear from the map or plat offered in evidence on the trial of this cause marked Defendants' Exhibit 'A,' which is

hereby referred to for the purpose of more particularly showing the said excess."

XIII.

That said Court erred in refusing to make a finding of fact as is set forth in paragraph 4 of defendants' request for findings, or one of similar import thereto, which reads as follows:

"4. That the said northwest corner stake of No. 6 above Discovery on Dome Creek, as claimed by the plaintiffs, was about 480 feet in a northerly direction from the lower center stake upon which the said Ross had caused a notice to be written that he claimed 1320 feet upstream and 330 feet wide."

XIV.

That said Court erred in refusing to make a finding of fact as contained in paragraph 5 of defendants' request for findings, or one of similar import thereof, which reads as follows:

"5. That the plaintiffs herein failed and neglected to file with the recorder of the Fairbanks Recording District within ninety days from the discovery of said claim a notice of location which contained the name of the locator, the date of the location and such a description of the claim with reference to natural objects and permanent monuments so that the same could be readily identified, but on the contrary said locator caused a pretended notice of location to be filed which fails to describe the

property with reference to some natural objects or permanent monument so that the same could be readily traced and which said notice of location claimed 1320 feet down stream from the upper center stake and 660 feet in width, as will more fully appear from said notice of location, a copy of which is herewith set forth, to wit:

"'LOCATION NOTICE.

"'Notice is hereby given that I, the undersigned, has located twenty acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, as follows: Commencing at a stake bearing location notice and adjoining No. 7 above Discovery; thence down stream a distance of 1320 feet to a stake, thence 660 feet in width to said claim. This claim to be known as No. 6 above Discovery on Dome Creek.

"'Located this the 18th day of September, 1902.

"'JOHN C. ROSS,

"'By his Attorney:

"'JAMES FUNCHION.

"'Witnesses:

"'HERBERT E. WILLSON.

"'Filed for record October 29th, 1902, at 1:30 P. M.

"'CHARLES ETHELBERT CLAYPOOL,

"'Commissioner and Ex-Officio Recorder.

"'By J. TODD COWLES,

"'Deputy.'"

XV.

The Court erred in overruling the defendants' objections to findings of fact No. 1 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

> "1. That the plaintiffs have established that the placer mining claim in controversy described in their amended complaint as Creek placer mining claim Number Six (6) above Discovery on Dome Creek, Territory of Alaska, Third Division, was duly staked for one John C. Ross by James Funchion, his duly appointed attorney in fact, on or about September 18, 1902; the same being prior to said date vacant, unoccupied mineral ground of the United States, and that on said date and thereafter before defendants entered thereon the boundaries thereof were clearly indicated by stakes thereof so that the same could be readily traced upon the ground, and that the said stakes and monuments were placed and established as follows: That said James Funchion placed his initial stake at the upper end of said claim, approximately in the center thereof, and thereupon had written a notice of location claiming twenty acres in extent, and in size six hundred and sixty (660) feet in width by thirteen hundred and twenty (1320) feet in length. That thereafter said Funchion established his southeast corner stake, being the upper left limit corner stake, at a distance of about three hundred and one and eight-tenths (301.8) feet from his initial stake, and marked said stake as the 'left limit upper corner

stake' of said claim, and thereafter said Funchion established his northeast corner stake, being the right limit upper corner stake, at a distance of about two hundred and eighty-eight and nine-tenths (288.9) feet from his initial stake and marked the same as his 'right limit upper corner stake' of said claim; that thereafter said Funchion established his northwest corner stake, being the right limit lower corner stake, by adopting the northeast right limit upper corner stake of creek placer mining claim number five (5) adjoining said claim number six, and marked the said stake as his right limit lower corner stake, the same being at about the distance of thirteen hundred and fifteen and four-tenths (1315.4) feet from his northeast upper corner stake, and that thereafter said Funchion established his lower center stake by adopting the upper center stake of said creek claim number five (5) above Discovery and next adjoining, at a distance of about three hundred and seventy-seven (377) feet from said northwest corner stake, and faced and marked said stake as his lower center stake, and that thereafter said James Funchion adopted for his southwest corner stake the southeast left limit corner stake of creek claim number five (5) next adjoining at a distance of about three hundred and sixty-four and four-tenths (364.4) feet from his lower center stake, and faced and marked said stake as his lower left limit corner stake, and that the distance between the southwest corner stake and the southeast corner stake of said claim is about thirteen hundred and twenty-five and one-tenth (1325.1) feet. That plaintiffs acquired title from the said John C. Ross by con-

veyance, and that plaintiffs and their grantor ever since location thereof have been entitled to the possession of said claim, and have made due discovery of gold thereon in such quantities as to justify a prudent man in further expending his time and money in developing and working said claim, and ever since the year of location have expended more than one hundred ($100.00) dollars each year in working and developing the claim as assessment work thereon, and had on the 29th day of October, 1902, duly filed their location notice."

XVI.

The Court erred in overruling the defendant's objection to finding of fact No. 2 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"2. That after the due location of said claim, and after the plaintiffs had acquired title thereto, and while they were entitled to the possession of the same, and were exercising dominion and control thereof, the defendants herein, by themselves, their servants, agents and employees, entered upon the same at a point near the northwest corner thereof, and began to mine and extract gold therefrom and were so doing at the date of the institution of this action."

XVII.

The Court erred in overruling the defendants' objection to finding of fact No. 3 of the findings of fact

signed and filed in this cause, and in making the same, which reads as follows:

"3. That when the said claim was originally located, it was staked and located in excess of twenty (20) acres, to wit, in the full area of about twenty-one and seven-tenths (21.7) acres, but that said excess was claimed unintentionally and by mistake, and that plaintiffs have occupied and possessed the same good faith in the belief that the area thereof did not exceed twenty (20) acres; and that said excess was not known and was not ascertained by either plaintiffs or defendants until after the institution of this action."

XVIII.

The Court erred in overruling the defendants' objection to finding of fact No. 4 of the findings of fact signed and filed in this case, and in making the same, which reads as follows:

"4. That the plaintiffs, before commencing this action, to wit: On or about September 1, 1906, caused a survey of said claim to be made by one R. A. Jackson, a competent surveyor, who after such survey and measurement ascertained the area thereof to be about seventeen and one-half (17.5) acres."

XIX.

The Court erred in overruling the defendants' objection to finding of fact No. 5 of the findings of fact

signed and filed in this cause, and in making the same, which reads as follows:

"5. That after the institution of this action, both plaintiffs and defendants caused surveys of the premises included within the boundaries of said claim as originally staked and marked to be made by competent surveyors, who after survey and measurement ascertained that the claim as originally staked and marked contained more than twenty (20) acres, to wit, about twenty-one and seven-tenths (21.7) acres, and such survey was received and accepted by the parties hereto as correct."

XX.

That the Court erred in overruling the defendants' objection to finding of fact No. 6 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"6. That the said plaintiffs, when they had ascertained to their satisfaction that said claim was in excess, forthwith drew in their lines so as to disclaim such excess at a point two hundred and thirty-three and eight-tenths (233.8) feet south of the lower end center stake, as originally staked and located, and erected at said point a substantial monument and placed thereon their amended notice of location signed with their names, marking such post or monument as the 'New southwest corner stake' of said claim, and claiming therefrom to the southeast corner stake as originally located a distance of about

thirteen hundred and eleven (1311) feet, and only filed a notice of said amended location, and notified the defendants herein of their action. But that said error and miscalculation in originally staking said claim was made and committed by said James Funchion without fraud but on the contrary in good faith and in the belief that the claim did not exceed twenty (20) acres in area."

XXI.

The Court erred in overruling the defendants' objection to finding of fact No. 7 of the findings of fact signed and filed in this cause, and in making the same, which reads as follows:

"7. That plaintiffs' amended location claims not to exceed twenty (20) acres, and that after duly recording the same, plaintiffs filed herein, by permission of the Court, an amended complaint claiming the area set out and described in their amended location notice."

XXII.

The Court erred in overruling defendants' objection to conclusion of law No. 1 of the conclusions of law signed and filed in this cause, and in making the same, which said conclusion of law reads as follows:

"1. That the plaintiffs, James Funchion and Amy Sale, are entitled to a judgment ordering and adjudging that they are the owners in fee, as against every person whomsoever except the United States

of America, as to the property set forth and described in their amended complaint in said cause, and known as creek placer mining claim number six (6) above Discovery, Fairbanks Recording District, Territory of Alaska, and that said plaintiffs are entitled to the sole and exclusive peaceable and quiet possession of the same."

XXIII.

The Court erred in overruling defendants' objection to conclusion of law No. 2 of the conclusions of law signed and filed in this cause, and the making of the same, which said conclusion of law reads as follows:

"2. That the defendants at the time of their entry on said premises as described in plaintiffs' amended complaint had no right, title, interest or estate in said described premises, or in any part or portion thereof, and that their entry was unlawful and without color of title, and that they have since said time acquired no right in and to said property."

XXIV.

The Court erred in overruling defendants' objection to conclusion of law No. 3 of the conclusions of law signed and filed in this cause, and in making the same, which reads as follows:

"3. That plaintiffs have judgment in accordance herewith."

XXV.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 1 of defendants' request for conclusions based upon the findings of fact made by the Court herein, which said proposed conclusion of law is as follows:

> "1. That the defendant, Zimmerman, is now and ever since the 12th day of May, 1904, has been the owner in fee, in possession, and entitled to the sole and exclusive possession of that certain placer mining claim known as bench claim No. 6 above Discovery, on the right limit and first tier of benches on Dome Creek in the Fairbanks Recording District, Territory of Alaska, which said claim includes within its boundaries the property in controversy between the plaintiffs and the defendants herein, which has been designated as the 'overlap,' and that the plaintiffs have no estate, right, title or interest in and to the same."

XXVI.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 2 of defendants' request for conclusions based upon the findings of fact made by the Court herein, which is as follows, to wit:

> "2. That said creek placer claim No. 6 above Discovery on Dome Creek was and is void as to the excess over twenty acres, and as said excess was claimed by the defendant, Zimmerman, on May

12th, 1904, he is now and ever since said time has been the owner in fee of the same and entitled to the sole and exclusive possession thereof."

XXVII.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 3 of defendants' request for conclusions based upon the findings of fact made by the Court herein, which is as follows, to wit:

"3. That the defendant, Zimmerman, is entitled to recover his costs and disbursements herein, and that a judgment should be entered in accordance with these findings and conclusions."

XXVIII.

The Court erred in not making and rendering a judgment in favor of the defendants and against the plaintiffs to the effect that the defendants are the owners in fee as to all persons save and except the United States in and to the property known and described as No. 6 Above Discovery on the right limit of Dome Creek, as staked and located by Zimmerman upon the 12th day of January, 1904, and which includes within its limits the property in controversy in this action.

XXIX.

The Court erred in not making and rendering a judgment in favor of the defendants and against the plaintiffs.

XXX.

The Court erred in rendering and entering a judgment in favor of the plaintiffs and against the defendants to the effect that the claim of the defendants in and to the property in this action described is groundless and without right.

XXXI.

The Court erred in ordering and adjudging that the plaintiffs recover their costs and disbursements herein.

XXXII.

The Court erred in refusing to make and file the findings of fact and conclusions of law proposed by the defendants, and in signing and filing the proposed findings of fact and conclusions of law submitted by the plaintiffs.

XXXIII.

The Court erred in overruling the defendants' objections to the findings of fact and conclusions of law signed by the Court in this cause.

XXIV.

The Court erred in allowing the plaintiffs, over the objections of the defendants, to introduce in evidence an amended notice and certificate of location, the same being marked Plaintiffs' Exhibit 5, which is in words and figures as follows:

"Plaintiffs' Exhibit 5.

"NOTICE AND AMENDED CERTIFICATE OF PLACER LOCATION.

"We, James Funchion and Amy Sale, citizens of the United States, hereby certify that we are the owners by purchase from the original locators of that certain placer mining claim situated in the Fairbanks Recording District, Territory of Alaska, Third Division, and further described as being placer mining creek claim number six (6) Above Discovery on Dome Creek, in the recording district aforesaid. That on the 18th day of September, 1902, John C. Ross, the original locator, by his attorney, James Funchion, duly located the said placer mining claim and on the 29th day of October, 1902, caused a record of said location to be duly entered and filed in the Circle Recording District, and that the said location was in the words and figures following, to wit:

"Notice is hereby given that I, the undersigned, has located 20 acres of placer mining ground on Dome Creek in the Circle Recording District, District of Alaska, described as follows: Commencing at a stake bearing location notice and joining No. 7 Above Discovery, thence down stream a distance of 1320 feet to a stake, thence 660 feet in width

of said claim; this claim to be known as No. 6 Above Discovery on Dome Creek.

"Located this 18th day of Sept., 1902.

"JOHN C. ROSS,

"By his Attorney:
JAMES FUNCHION.

"Witness:
"HERBERT E. WILLSON.

"Filed for record Octo. 29, 1902, at 1:30 P. M.

"CHAS. ETHELBERT CLAYPOOL,
"Commissioner and ex-Officio Recorder.

"By J. T. COWLES,
"Deputy.

"That for the purpose of reducing the area of said claim and for the further purpose of curing any defects and errors in the said original certificate, and any failure to comply with the requirements of law in that respect and with the further purpose of better describing the lines and surface boundaries of the said location as amended, we, the owners, now make and file in the office of the proper recording district at Fairbanks, Alaska, this, our amended certificate of location of the said claim, and that the description of said claim will be henceforth as follows, to wit:

"Creek placer mining claim No. 6 Above Discovery on Dome Creek, the boundaries thereto being substantially as follows: Starting from the initial

stake at the upper end of said claim, approximately in the center thereof, thence northerly a distance of 269 feet to the northeast corner stake, and from said corner stake thence westerly for a distance of 1313 feet to a stake marked 'Lower right limit northwest corner stake,' between creek claims No. 5 and No. 6; thence in a southerly direction slightly to the west for a distance of 477.1 feet to another stake marked 'west and center stake'; thence in a southerly direction for a distance of 233.8 feet to a stake marked 'Lower southwest corner stake'; thence in an easterly direction for a distance of 1311 feet to a stake marked 'southeast corner stake,' thence in a northerly direction for a distance of 301.5 feet to the point of beginning.

"That we have caused a permanent monument, being a substantial post, to be erected on the lower boundary down stream between the west end center stake and the former southwest corner stake 233.8 feet from the said west end and center stake and 129.3 feet from the former southwest corner stake, which said stake will henceforth be our permanent southwest corner stake and is marked 'new southwest corner stake of creek claim No. 6 Below Discovery, amended location,' and signed with our names.

"That said amended location as above described embraces the original discovery as well as all development work which we have done or which has been performed upon or for the benefit of said original claim, and we thereby claim that this amended certificate of location relates back to the date of the original location and that it is entitled to the benefit

of the original discovery as well as all work done or improvements made by our grantors and ourselves within the limits of said amended location, or for the benefit of the original locator.

"JAMES FUNCHION,
"AMY SALE.

"(Endorsements): Indexed: No. 16,604. Notice and Amended Certificate of Placer Location Creek Claim No. 6 Above on Dome. James Funchion and Amy Sale. District of Alaska, Third Judicial Division, ss. Filed for Record at Request of C. E. Claypool on the 3d day of Nov., 1906, at 40 min. past 10 A. M., and Recorded in Vol. 7 of Locs., page 626. Fairbanks Recording District. G. B. Erwin, Recorder, by Henry T. Ray, Deputy.

"No. 572. In the District Court, Territory of Alaska, Third Division. *Funchion* vs. *Zimmerman*. Plaintiffs' Exhibit No. 5. Filed in the District Court, Territory of Alaska, Third Division. Nov. 21, 1906. E. J. Stier, Clerk. By E. A. Henderson, Deputy."

XXXV.

The Court erred after all the testimony on behalf of the plaintiffs and defendants was closed and said cause submitted to the Court for decision in ordering and directing that Herbert E. Willson go to the premises in controversy and make an inspection as to the condition of the stakes on said ground and report the same to said Court.

XXXVI.

The Court erred in admitting in evidence the said report of said Ralph Hatton, Herbert E. Willson and in considering the same, and in rendering the decision in this cause upon the said testimony of said witnesses, and not upon the said testimony of all of the witnesses upon said trial.

XXXVII.

The Court erred in not rendering a judgment in favor of the defendant, Zimmerman, to the effect that he is the owner and entitled to all that portion of said creek claim No. 6 as originally staked, which is in excess of twenty acres.

ARGUMENT.

The two points involved in this case are interpedendent, necessitating the presentation of both more or less conjointly. They are these:

1. Creek Claim No. 6 when located by the defendants in error was admittedly in excess of twenty acres, and the lines had not been drawn in nor was there any *pedis possessio* when plaintiffs in error located, nor until long after the institution of the action. The area being in excess of the statutory limits, rendered the location of said claim void as to such area.

2. That Funchion in locating the claim for Ross and in placing his lower center stake and designating

thereon the amount that he claimed, namely, 1320 feet up stream, together with 330 feet on each side thereof, without designating any course or distance therefrom to another stake, was bound by his claim of 330 feet on each side, and no subsequent prospector would be required to look beyond the 330 feet distance to discover any monuments marking off the boundaries of the claim. Certainly not 147 feet more—more than one-third of 330 feet. That having so designated the amount of ground *claimed*, which was within the legal amount, the alleged staking of the location away beyond such claimed limits was not a marking distinctly of the boundaries in compliance with the statute so that they could be readily traced on the ground; and any subsequent locator would have an absolute right to locate to include such excess, unless the original locator was in the *actual* possession of such excess actively engaged in mining the same.

We beg to call the attention of the Court to the following facts clearly disclosed by the evidence and practically undisputed.

It will not be necessary to consider the evidence as an entirety. There is no dispute practically as to the location of the creek claim originally by Funchion. There is none as to the location of the Bench Claim No. 6 by Zimmerman. There is no practical dispute as to the writing on the lower center stake "E" of Funchion's claim. (Defendants' Ex. B.) The only real dispute in relation to the marking of the claim of Fun-

chion, was as to where the northwest corner or lower right limit corner stake was placed. It was the contention of defendants in error that it was placed at the point designated on said Exhibit "B" as "A," which would be 477 feet from the lower center stake, designated on said exhibit as "E." The contention of plaintiffs in error was that said corner stake was at the point designated on said Exhibit "B" as "C," which was some 345 feet from the said lower center stake. Funchion testified that he in company with Herbert Willson staked the claim on September 17th or 18th, 1902. That they put in the upper center or initial stake first at "H" (Defendants' Ex. B), and that they wrote on it that they claimed 1320 feet by 660 feet in width (Tr., 38, 40, 48). That while Willson was establishing the lower center stake at "E" (Defendants' Ex. "B") Funchion went up the hill and established the upper corner stakes at "B" and "G" respectively, as designated on said map, and thereafter Willson established the northwest corner stake at "A" at a point 477 feet from the point "E," the lower end center stake. Funchion says he doesn't remember just what Willson wrote on the lower center stake "E" (Tr., 50), but that the distance therefrom to "A" was 477 feet, and the distance from there to "F," the lower left limit corner stake, was 364 feet (Tr., 52), which would make the lower end of his claim some 844 feet wide as opposed to his upper width as shown on Defendants' Exhibit "B" to be 590.7 feet, being 301.8 and 288.9 feet re-

spectively on either side of the upper center stake "H" (Tr., 340).

Funchion after locating the claim did not return thereto until 1903, when he went over there with Ross, the man for whom the claim was originally staked, and sunk a hole to bed rock some 22 feet deep, down near the creek, *not on the disputed territory*, and, with the exception of having the assessment work done, did not do anything further to the location or return thereto until April, 1905, when he came on the ground and visited Zimmerman in his cabin, where the latter had been living since September, 1904, on Bench Claim No. 6 (Tr., 163).

It is in evidence that Zimmerman showed him some coarse gold that he had taken from the ground (Tr., 156) and a week later Funchion and a man by the name of McPike came out on the ground and blazed out all the alleged lines of Creek Claim No. 6, showing them to run from "A" to "B" to "F" to "G" and including "E" and "H" (Defendants' Exhibit B).

This disclosed to Zimmerman for the first time that Funchion claimed as his northwest corner the point designated as "A" on the said Exhibit. According to Zimmerman, while he had discovered this post about a month after he had located his claim, there was nothing on it to indicate that it was a corner post or monument of the creek claim, but it bore a notice that it was the right corner post of No. 5 Bench and also the notice of a man by the name of McQuillan, which was taken off

when Funchion and McPike visited the claim in April, 1905. Funchion admits that he effaced the markings on that stake at this time, and wrote his own name on it, claiming that it was his stake and his writings had become obliterated (Tr., 62-3).

Willson, who assisted in the staking of the Funchion claim, testified pretty much along the same lines as did Funchion, but while he testified to establishing stake "E," the lower end center stake, he wasn't positive as to whether he wrote 330 feet on each side of 600 feet wide in addition to claiming 1320 feet up stream. "He really forgot what he did write" (Tr., 80). However, there can be no question as to what was actually written on this stake, as in addition to the positive testimony of Zimmerman that the said post was marked 1320 feet up stream by 330 feet on each side, we have the testimony of Cook, who testified to seeing this lower center stake with the same inscription in January, 1905 (Tr., 210); of Hatton, who said that he saw it in December, 1904, and of their own witness Bush, who also testified to the same effect (Tr., 232).

It appears from the testimony of Zimmerman that on the day he made his location, he went to the point designated as "E" on the map (Defendants' Exhibit B), which was the lower center post of the Creek Claim No. 6, and on which was written this inscription of 1320 feet up stream by 330 feet on each side thereof (Tr., 148). That from there he went in a northerly direction a little to the west along a slightly blazed trail, to

where he found another post, about 345 feet from the lower center post, he having stepped it off twice to make sure of the distance. This post was mildewed, and had some writing on it, but as it was in the afternoon and dark when he was there he could not distinguish all of the writing, but made out the words "Dome Creek." In finding this post at such a point and at such a distance from the lower center post, taking into consideration the distance claimed on each side of the said lower center post, he naturally took it for granted that this must be the north-west corner stake of Creek Claim No. 6, and staked his location accordingly. His testimony as to this post is corroborated by that of both Cook and Hatton, who stated that a careful examination of the post showed a writing indicating that it was the corner post of No. 6 Above Discovery, being designated as such corner post (Tr., 196, 204). After stepping off the 345 feet and discovering the post at this point, Zimmerman decided to establish and did so establish his south-east corner post a few feet from it, and proceeded to make his location. He blazed a line through along the creek for his corner post, went up to the upper end and found the upper corner post of Creek Claim 6 (Tr., 151), and then established the south-east corner of his claim; then going up the hill to the north-east corner established a post, then down to the north-west corner where he established another post and completed his marking (Tr., 152, 154). Thus he natur-

ally included within his boundaries the disputed piece of ground.

It should be borne in mind that the defendants in error never were in the actual possession of the ground in dispute, nor in fact of the other portions of their claim; no attempt being made to show actual possession on their part, nor did they ever do any work on the ground in dispute. The only work done being, as claimed, the annual assessment work, if any, and the hole dug to bedrock down near the creek (Tr., 42).

Funchion testified that he knew that Zimmerman was on the ground from May 12, 1904, claiming up to his stakes, and that Zimmerman had always claimed to them, defendants in error, that they were too wide at the lower end (Tr., 59).

After the institution of the action and *after* the surveys were made showing the excessive area of the claim of defendants in error, as we have hereinbefore suggested to the Court, defendants in error notified the attorneys for plaintiffs in error that they intended to amend their location so as to make it conform to law, by placing a new lower southwest corner stake at a point 233.8 feet from the lower west end center stake and to file for record an amended location certificate in accordance therewith, which was ultimately done on the third of November, 1906. This drawing in of the lines of Creek Claim No. 6 retained the part in dispute on which Zimmerman had been working, digging holes to bed rock, *and on which he had demonstrated that the*

pay streak lay, but cut off the southern portion of the claim, which had not been shown to be of any value.

Upon practically these facts the court below found that the claim of Funchion to the disputed ground was superior to that of Zimmerman. In other words, the court held that where a placer locator makes a location in excess of twenty acres he has power to reserve his right to throw off the excess for an indefinite period, irrespective of valid intervening rights accruing on the excess of area, and irrespective of the fact that he is not in the actual possession of the disputed ground when the subsequent entry is made.

This is not and can not be the law.

I.

The law seems to be clearly settled that where a mining claim is located in excess of the statutory area, in good faith, and injures no one at the time it is made, it is void only as to the excess.

Lindley on Mines, Sec. 362;
Snyder on Mines, Sec. 398;
English vs. *Johnston*, 17 Cal., 108, 117;
Howeth vs. *Sullenger*, 113 Cal., 547;
Thompson vs. *Spray*, 72 Cal., 528;
Jupiter M. Co. vs. *Bodie Cons. M. Co.*, 11 Fed., 666;
Patterson vs. *Hitchcock*, 3 Colo., 533;

Taylor vs. *Parenteau,* 48 Pac., 505;
Hanson vs. *Fletcher,* 37 Pac., 481;
McPherson vs. *Julius,* 95 N. W., 428-435;
McElliott vs. *Keogh,* 90 Pac., 823, 825.

The rule laid down in Montana is far more strict and where a claim is located and the outlying boundaries indicate a location in excess of the statutory area, not the excess alone, but the whole location is held void.

Leggatt vs. *Stewart,* 5 Mont., 107, 15 Mor. M. Rep., 358;
Hauswirth vs. *Butcher,* 1 Pac., 714.

However, we are not contending that such is the general law, but are content to hold with the principle laid down by both Snyder and Lindley in their text books, that the sound rule is that the excess alone is void.

But the question to be decided herein is, when is such excess open to occupation by a subsequent locator? When and how is such excess to be determined? A miner locating a valid claim is treated as a licensee of the government, and independent of a purchase from the United States by obtaining a patent therefor, where he complies with all the provisions of the mining laws, is entitled to the property and to appropriate all the minerals contained therein. The government holds out a standing offer to him of a title in fee by way of patent, but he may accept or reject it at his pleasure.

In the meantime he can exhaust the substance of the claim, the minerals therein, and keep all others out. Practically he does not need a patent.

The law says with reference to placer mining locations, "No such locations shall include *more than twenty acres* for each individual claimant." (Italics are ours.)

Sec. 2331, R. S. U. S.

And the policy and object of the law is to limit the quantity of placer mineral land which may be located by one claimant to twenty acres.

Mitchell vs. *Cline,* 84 Cal., 415.

If, as is the only deduction from the findings and judgment in this case, a locator can by so marking his boundaries in defiance of the stattuory mandate, even doing so innocently, take up 22 acres of mineral land, and without working it or being in actual possession of it, maintain his right at any time within his discretion to reject the excess and elect to draw in his lines in such a manner as to include the ground proven to be valuable by the hard work of a subsequent locator on such excess, or exclude any subsequent locator therefrom entirely, why can not he take up twenty-five, thirty or forty acres and pursue the same course? The principle is the same, and yet if this be so, would not the very object of the statute be defeated, namely, the purpose

to limit individual placer locators to twenty acres of ground?

And what protection is there to a subsequent honest prospector, who, roving the public domain in search of unoccupied ground, finds, as in this instance, a stake claiming 1320 feet up stream and 330 feet on each side. Guided by such stake he paces the ground off a distance of fifteen feet more than the claimed three hundred and thirty feet, and then proceeds to make his location outside thereof. There is no one on the ground, no evidence of occupation or of diligent mining for minerals. He proceeds to locate, works assiduously, discovers the pay streak, and then after two years, the original locator, who has done nothing but hold constructive possession of the claim, comes along and says:

> "You made a mistake when you read that location notice. I placed my upper corner stake 480 feet beyond the lower center stake that you found where I claimed 330 feet on each side. You were mistaken in my boundaries, but I now exercise my right of election and have decided to draw in my lines to include your ground. It is true I staked too wide, that you told me I had staked too wide, but still I staked and you are within my outlying boundaries on that side, and the valuable mine you have uncovered belongs to me."

Does the statute contemplate any such procedure? It can hardly be within the bounds of reason or of justice that such can be the law.

Says Beatty, J., in the case of *Gleeson* vs. *White Mining Co.*, 13 Nev., 462:

> "The object of the law requiring the marking of boundaries is designed to prevent floating or swinging so that those who in good faith are looking for unoccupied ground in the vicinity of a previous location, may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue. The provisions of the law designed for the attainment of this great object are most important and beneficent and they ought not to be frittered away by construction."

Would not the very object of the law in this respect be rendered nugatory, if the decision of the lower court upon the facts of this record is held to be the law? In that case all that one need do would be to take up a piece of placer mining land, post a misleading notice similar to the one at bar, place his stakes away outside of the statutory area, do the requisite assessment work, and then wait for the poor fly, guided by the notice, to fall into his web, by locating over the excess of area in his location under an honest belief in its being unappropriated. If he is not successful in laying bare the pay streak, do nothing. If he succeeds by diligent efforts and the expenditure of time and money in making a "strike," draw in your lines to include his labors. In other words, "float" or "swing" your claim as expediency suggests.

The Supreme Court of Montana in discussing a similar condition says pertinently:

> "The claim in question as shown by the stakes and boundaries thereof, is 2000 feet in length, whereas the greatest length as authorized by the law is 1500 feet. If such a location could be sustained to the extent of 1500 feet, *where the rights of third persons had not intervened, which we do not decide, certainly if such rights had attached, such a location would not protect 500 feet in length of claim more than the law authorizes, by virtue of one discovery. A 1500 feet claim can not be shifted from one end to the other of a 2000 feet claim as circumstances might require, to cover the discovery of a third person within such 2000 feet location.*"

Hauswirth vs. *Butcher,* 1 Pac., 714.

And says Sawyer, J., in the case of *Mt. Diablo M. & M. Co.* vs. *Callison,* 5 Sawy., 449:

> "The locator should make his location so certain that the miners who follow him may know the extent of his claim and be able to locate the unoccupied ground *without fear that when they shall have found a paying mine the theretofore indefinite lines of some prior location may be made to embrace it.*" (Italics ours.)

Can the defendants in error be said to have done this? For if the point designated as "C" was not their northwest corner post, admitting that "A" was such

post, it was 480 feet from the lower center stake which claimed 330 feet on each side thereof by a length of 1320 feet, which would cover the statutory area of twenty acres. A locator is presumed to take all that the law allows him, and such presumption was indulged in by Zimmerman with reference to the Funchion claim.

> "The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice, and would be equivalent to no boundaries at all."
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> *Hauswirth* vs. *Butcher,* 1 Pac., 714.

And in this case the writing on the lower center stake imparted notice to Zimmerman as to what extent of ground was claimed. Here was an express declaration of the length of the claim, and the width claimed on each side. What more could be expected of a subsequent locator than that he should measure the ground therefrom, as did Zimmerman, in order to see that he was without the extent claimed, before he located?

Lindley on Mines, Sec. 362.

Every man is presumed to know the law. If Zimmerman could, by a slight effort of the will, step off the ground in order to ascertain the actual ground which three hundred and thirty feet distant from the point "E" would cover, what was there to prevent Funchion from

doing likewise and establishing his post within a reasonable estimate of that distance, instead of 150 feet further up? A man may make a mistake of a few feet, of ten, say, or twenty or perhaps even fifty, but when it reaches one hundred and fifty feet, while the excess on the south side was only thirty feet, he should not be heard to complain when a subsequent locator takes pains, after reading his express declaration, to measure the ground in accordance therewith and arrive at a conclusion that a post just 345 feet away is his corner post. The object of a notice of this sort is to guide a subsequent locator and to afford him information as to the extent of the prior locator, and where the prior locator has made such a declaration he can not be permitted to ignore it, and stake out his boundaries with no reference thereto.

> "The least that can be required of locators is that the corner stakes shall not be so far apart as to include an area greater than the size of the claim as described in the posted notice, or greater than the law allows to be included in a single claim. . . . *In such a case the excessive distance between the corner stakes is misleading, and a locator who has committed such an error has failed to comply with the law.*" (Italics ours.)

Ledoux vs. *Forester,* 94 Fed., 600.

But if Funchion had placed but two stakes, one at the upper and one at the lower end center of the claim, and

had written upon the lower end center stake that he claimed 1320 feet up stream by 330 feet on each side thereof, that would have been a sufficient marking, so far as Zimmerman was concerned under the circumstances of this case, to comply with the law and to afford to Zimmerman an opportunity of estimating the length and breadth of the claim.

McKinley Creek M. Co. vs. *Alaska United M. Co.*, 183 U. S., 563;

Loeser vs. *Gardiner*, 1 Alaska Rep., 641;

Jupiter M. Co. vs. *Bodie Con. M. Co.*, 11 Fed., 666;

North Noonday M. Co. vs. *Orient M. Co.*, 1 Fed., 533;

Gleeson vs. *Martin White M. Co.*, 13 Nev., 442.

The fact that Funchion did more than this, and placed his northwest corner stake 480 feet instead of 330 feet distant, entirely misleading subsequent locators, can not be deemed an element in his favor in considering the question before the Court as to his right to throw off the excess, or as militating against Zimmerman, who acted in good faith and who actually located, not on the area that Funchion was entitled to, but on the excess to the extent of which the law declares Funchion's location to be void. If void, then it was still a part of the unoccupied public domain, especially under the facts of this case where no possession or occupation

thereof was shown, and Zimmerman was within his legal rights when he located to include this excess.

A different rule might probably be applied had an *actual* possession been shown on the part of Funchion at the time of the alleged ouster, diligently working on the ground.

In the case of *M'Intosh* vs. *Price*, 121 Fed., 716, where the prior locator was in the *actual possession* of the admitted excess *diligently working in good faith on the same*, it was held he was at liberty to elect what portion he would reject of his alleged excessive location or what retain, this Court saying:

> " . . . We are very clearly of the opinion that if any portion of the ground located by the Kjelsbergs was subject to relocation as being in excess of the permitted width, the owners thereof in possession under the circumstances found by the trial court, could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim *in which they were working, and which was the valuable portion thereof, and oust them from the possession by making a location thereon.*"

The case of *M'Intosh* vs. *Price* involved the question of when the excess is to be considered open to appropriation by a subsequent locator. But actual possession of the prior locator gave him the right to designate where the excess should be cut off, and his being

in the actual possession of the disputed strip was a sufficient election by the first locator.

It is difficult to find adjudicated cases on all fours with the case at bar, but logical reasoning would suggest that the law must be in accordance with the argument advanced by us, that where a locator monuments a piece of ground in excess of the amount allowed by law, and makes no attempt to actually occupy the same or to work it for the minerals *supposed* to be contained therein, and the fact of the excessive area is patent to all subsequent locators, made so by the express declaration of the original locator by the writings on his stakes, there is no rule of law that will allow such prior locator to hold such excess indefinitely to the exclusion of valid locators in good faith thereon.

The case of *McPherson* vs. *Julius*, reported in 95 N. W., 428, is, however, in point, and instructive, as the facts are analagous to some extent. There a locator staked the Wasp No. 2 claim in 1893, and embraced within its boundaries an excessive area of some 161 feet embodied within a prior location,—the Hilltop. In 1894, a year later, the Hilltop drew in its lines so as to exclude this area. Upon it being claimed by a subsequent locator within the lines of the Wasp No. 2, that the latter's location was void because of its inclusion of this portion of the Hilltop, the Court in holding the Wasp No. 2 a valid location, uses the following language:

"It is further contended by the appellants that at the time the Wasp No. 2 made its location, the ground in controversy was within the exterior boundary lines of the Hilltop as staked, and therefore it acquired no right to that ground.

"But as we have seen, the Hilltop was located 161 feet too long, and in 1894 it drew in its south end line, leaving the ground in controversy outside of its claim. Its *location was void as to the excess, and the excess of the Hilltop within the exterior boundary lines of Wasp No. 2 became a part of that claim, subject of course to any prior valid claim.* A location made conflicting with another prior location if a proper discovery is made, is valid against all persons except the prior locator, and if the claim of the prior locator is abandoned, forfeited, *or any part of the claim in conflict is not rightfully held by the prior locator, the subsequent location attaches to so much of the ground not legally held by the prior locator as is within the lines of the subsequent location.* We are of the opinion, therefore, that the excess constituted a part of the Wasp No. 2 as against the Little Blue Fraction." (Italics ours.)

II.

Such being the law under our view, we contend that the Court necessarily erred in refusing to make findings of fact in accordance with the request of plaintiffs in error and as embodied in Assignments of Error I, II, III, IV, V, VI, X, XI, XX, XIII, as the same were, as we have shown, warranted by the evidence in the case and stated the exact facts.

III.

The Court erred in refusing to find as a conclusion of law upon the request of the defendants, to the effect that Zimmerman was entitled to a judgment decreeing that he was the owner of the property set forth and described in his answer and entitled to the exclusive possession of the whole thereof, and that the plaintiffs in the action had no right or title thereto, and further that a judgment should be entered in accordance with such conclusion of law as embodied in Assignments of Error VII, VIII and IX. Said proposed conclusions of law were not alone warranted by the evidence in the case, but stated the law correctly as a deduction from said evidence, and for the reasons hereinbefore stated the Court should have made such conclusions of law.

IV.

The Court erred in refusing to make a finding of fact as requested by the defendants in error and as embraced in Assignment of Error XIV, to the effect that the plaintiffs had failed to file with the recorder of the Fairbanks Recording District a proper notice of location in that the same had no reference to a natural object or permanent monument.

The notice reads as follows:

> "Notice is hereby given that I, the undersigned, has located twenty acres of placer mining ground

on Dome Creek, in the Circle Recording District, District of Alaska, as follows: Commencing at a stake bearing location notice and adjoining No. 7 Above Discovery; thence down stream a distance of 1320 feet to a stake, thence 660 feet in width to said claim. This claim to be known as No. 6 Above Discovery on Dome Creek. Located this the 18th day of September, 1902.

"JOHN C. ROSS,
"By his attorney, JAMES FUNCHION.

"Witnesses: Herbert E. Willson.

"Filed for record October 29, 1902" (Tr., p. 306).

Under Sec. 15, Part III, Ch. 1, Carter's Annotated Codes of Alaska, it is necessary that the locator of a mining location shall record his notice within ninety days from the date of the discovery of the claim.

By Section 2324 R. S. U. S., it is provided that where a recordation of a certificate of location is required by the statute, it must contain such a description of the claim or claims located by reference to a natural object or permanent monument as will identify the claim.

This provision is mandatory.

Lindley on Mines, Hammer vs. *Garfield M. Co.*, 130 U. S., 291;
Darger vs. *LeSieur,* 30 Pac., 364;
Faxon vs. *Bernard,* 4 Fed., 402;
Gird vs. *California Oil Co.,* 60 Fed., 531, 536.

Says Judge Ross in the case last cited:

> "The record of a mining claim, where one is required, *is intended to contain a more exact and specific description of the claim than the notice posted on it.*" (Italics ours.)

And the Supreme Court of the United States in the case of *Hammer* vs. *Garfield*, *supra*, states clearly what the provision of Section 2324 in this respect was meant to secure, to wit:

> "These provisions *as appears on their face,* are designed to secure a definite description, one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose." (Emphasis ours.)

Can a reading of the notice in question be said to even remotely comply with the statute? There is no such definite description of the claim as will serve to identify it by a reference to either a natural object or a permanent monument. It can not be said that there is any description of the claim in such notice as would serve to guide an intelligent prospector to the claim with reasonable certainly. And *reasonable* certainty is what is absolutely required in order to make the certificate sufficient.

> *North Noonday M. Co.* vs. *Orient M. Co.*, 1 Fed., 522.

In the absence of such a reference the certificate had no validity, as it was not a compliance with the law, and the Court should have so found as a matter of fact.

V.

The Court erred in overruling defendants' objections to Finding of Fact No. 1 signed and filed in the cause (Assignment of Error XV), and especially to that portion thereof which found as follows:

> "That thereafter said Funchion established his northwest corner stake, being the right limit lower corner stake by adopting the northeast corner right limit upper corner stake of Creek Placer Mining Claim No. 5 adjoining said claim No. 6, and marked the said stake as his right limit lower corner stake, the same being about 1315 feet from his northeast upper corner stake."

Said finding is not supported by the evidence, and is, in fact, contrary thereto. There is no testimony that Funchion adopted the northeast corner right limit upper stake of Creek Claim No. 5, or that he marked it "the right limit upper corner stake."

Funchion testified in relation to the placing of this northwest corner (conceding that said corner was placed at said time, which we contest):

> "Herb (Willson) went up the creek to No. 7. . . . . Then when he came down, on our way down, we put out the lower stake. He and I went

out and put out that lower right limit corner stake. He put it out and I blazed the lines. Q. Who marked it? A. *He marked it the corner between 5 and 6 claims;* it was the dividing corner between both claims. . . . " (Tr., 41).

While Willson says:

"That he put out that stake, that lower right limit corner stake. Q. What was it, Mr. Wilson. A. It is a tree. Q. Of what size? A. About four inches. Q. What did you do with it? A. I wrote the corner notice *on it, 'upper corner stake of 5, lower corner of 6'* " (Tr., 72).

In other words, there was not alone no corner stake of Creek Claim No. 5 *to adopt,* because if the testimony of Wilson is true, he staked both corners at the same time, but the language found by the Court to be inscribed on this stake was not the writing testified to by either Willson or Funchion.

VI.

The Court erred in overruling the objection of defendants to Finding of Fact No. 2 of the findings of fact signed and filed in the cause (Assignment of Error XVI) and especially to that portion thereof as follows:

"And after the plaintiffs had acquired title thereto, and while they were entitled to the possession thereof, *and were exercising dominion and control thereof,*"

as the same is not based on any evidence in the record, is untrue, and was an attempt on the part of the plaintiffs to show an actual possession.

> "By actual possession is meant a *subjection to the will and dominion* of the claimant, and is usually evidenced by occupation—by a substantial enclosure—by cultivation or by appropriate use according to the particular locality and quality of the property."
>
> *Coryell* vs. *Cain,* 16 Cal., 574.

> "Ordinarily the expressions 'occupation,' *'possessio pedis,' 'subjection to the will and control,'* are employed as synonymous terms *and as signifying actual possession.*" (Italics ours.)
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> *Lawrence* vs. *Fulton,* 19 Cal., 690.

There is not an iota of evidence showing that the defendants in error were on any of the ground comprising their alleged location when Zimmerman entered on the excess thereof, much less on the strip in dispute, or that they exercised any acts of dominion or control over it. By such a finding there is an attempt to bring the case within the principle laid down in *M'Intosh* vs. *Price* hereinbefore discussed, and we contend that such finding is fatal error, as it goes to a vital point in the case which may have been decisive of it.

The judgment, therefore, based upon such a finding, there being no evidence to support it, must be reversed.

White vs. *Douglas*, 71 Cal., 115;
Bolton vs. *Stewart*, 29 Cal., 615.

VII.

The Court erred in overruling defendants' objections to Finding of Fact No. 4 (Assignment of Error XVIII), as the same was purely evidentiary and the survey was admitted to be erroneous by the two surveys subsequently made; and error was also exhibited in Finding of Fact No. 5 (Assignment of Error No. XIX), as the same embodied evidentiary matter not relevant or material to the issues raised by the pleadings.

VIII.

Finding 6 of the Court (Assignment of Error XX), is erroneous in that it is irrelevant and immaterial to the issues raised and embraces matters accruing subsequent to the institution of the action. This finding bears upon the fact that Funchion drew in his lines after the surveys had been made, disclosing his area to be excessive, and also filed a notice of amended location at the same time. While said finding is based upon evidence to that effect, the further finding therein that the "error and miscalculation in originally staking said claim was made and committed by said James Funchion without fraud, but, on the contrary,

" in good faith and in the belief that the claim did not " exceed twenty acres," is not supported by the evidence given on the trial and is contrary thereto. There is nothing in the record showing that Funchion miscalculated the distance between either side of his lower center stake and his corner posts unintentionally. He made a pretty wide guess on the south end by exceeding the 330 foot limit claimed by only 34 feet; he also estimated his distances on the upper end of his claim fairly well, as evidenced by the maps introduced in evidence, but why he did not exercise the same judgment on the north side of his lower center stake instead of "miscalculating" 150 feet is a conundrum. Or perhaps is it not more reasonable to suppose that he did not "miscalculate" to such a degree but that his lower right limit corner post was where Zimmerman, Hatton and Cook claimed it to be, and where Zimmerman found it after stepping off 345 feet from "E"?

But if he did miscalculate or was negligent, who is to suffer? The one who was negligent or wrong, or those who were not?

IX.

The Court erred in allowing to be introduced in evidence over the objection of the plaintiffs in error, the amended certificate of location of the defendants in error filed for record on November 3, 1906, long after the institution of the action, and long after the inception of the rights of the plaintiffs in error (Assignment of Error XXIV).

In order that the amended location certificate of the defendants in error should have any value, or relate back to the date of their original certificate, their location must have been a valid one. The right to file an amended certificate of location is subject and subservient to intervening adverse rights; and under the position that we take on the law controlling in this case, and of our right to locate upon the excessive area of the location of the defendants in error, the same being void, no amendment of the location of the defendants in error could be made upon ground already appropriated by us, and no certificate of record showing an amended location after our rights had intervened could have any materiality.

Such a certificate could not create a right of possession or location in the premises which did not exist prior to the filing thereof, and it could confer no additional rights and therefore could be evidence of none as against the plaintiffs in error.

Strepy vs. *Stark,* 5 Pac., 111, 115.

That seems to be the keynote of the decisions; that an amended certificate may be filed at any time and have value *if* it does not interfere with the existing rights of others. See *Morrison* vs. *Regan,* 67 Pac., 956, decided with reference to a statute permitting the record of an amended location where the Supreme Court of Idaho say:

"That section provides for the amendment of original certificates of location, and provides that if the locator shall apprehend that his original certificate was defective or erroneous, or that the requirement of the law had not been complied with, etc., such locator or his assigns may file an amended certificate curing such defects and such amended certificate relates back to the date of the original location, *provided that it does not interfere with the existing rights of others.* Most, if not all, of the mining States have similar statutes that have been considered and construed by the Federal courts and the Supreme courts of those States. From such statutes and the decisions under them, it is clear that an amended certificate may cure a defective or erroneous certificate and relates back to the original, *except when such original certificate is absolutely void, or when the rights of others have intervened between the date of the original and amended locations.*"

As the record shows, the rights of plaintiffs in error had intervened, before the filing of the amended certificate, and the excess of area of Creek Claim No. 6 was lost to the defendants in error by the valid appropriation thereof by Zimmerman.

McPherson vs. *Julius,* 95 N. W., 428.

Any attempt on the part of defendants in error to thereafter locate over the ground of plaintiffs in error (which was really what they attempted to do by the so-called drawing in of their lines) or to file additional

or amended certificates of location would be mere wasted energy on their part, under our view of the law.

In conclusion, we submit that the question before the Court in this case in its relation to locations covering excessive areas and the rights of subsequent locators thereon is one of importance to miners, and one which is as yet practically undecided *in toto*. We believe that the lower court erred in its construction of the law as applied to the facts of this case, and that judgment should have been rendered for the plaintiffs in error. For the errors assigned, we ask that the judgment be reversed.

JOHN L. McGINN,
M. L. SULLIVAN,
Attorneys for Plaintiffs in Error.

CAMPBELL, METSON, DREW, OATMAN & MACKENZIE, AND E. H. RYAN,
Of Counsel.